IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 4057

UNITED STATES OF AMERICA *ex rel.* L. B. BINION,
Petitioner,

v.

UNITED STATES MARSHAL FOR THE DISTRICT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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L. B. Binion, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on June 26, 1961.

OPINIONS BELOW

The opinion of the United States District Court for the District of Nevada (R. 11-24)* is reported at 188

* References prefixed "R" are to the printed Transcript of Record filed in the court below.

F. Supp. 905. The opinion of the Court of Appeals for the Ninth Circuit (Appendix A, *infra*, pp. 1a-8a) is not yet reported. The opinion of the United States Court of Appeals for the Third Circuit (Appendix E, *infra*, pp. 14a-20a) is reported at 273 F. 2d 495. The opinion of the United States District Court for the Eastern District of Pennsylvania is not reported (Appendix F, *infra*, pp. 20a-26a).

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, p. 8a) was entered on June 26, 1961. A timely petition for rehearing was denied on August 4, 1961 (Appendix C, *infra*, p. 9a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The constitutional provision, statutes, and rules involved are set out in (Appendix D, *infra*, pp. 9a-13a).

QUESTIONS PRESENTED

1. Whether, after one Court of Appeals had determined that a prisoner has earned 50 days towards service of a sentence, and a District Court in another circuit holds that he has not earned those fifty days, the second Court of Appeals may properly refuse to consider the correctness of the first Court of Appeals' determination, thus leaving the Government's custodial officers without appropriate guidance as to the proper release date, and requiring the prisoner to bring another habeas corpus to determine the issue.

2. Where a United States District Court discharged petitioner in a habeas corpus action and he was released without bail and not on his own recognizance, does his sentence of imprisonment continue to run until the United States files notice of appeal so that, even

though the District Court is subsequently reversed, petitioner is entitled to credit toward the balance of his sentence for that time?

3. Where a United States District Court discharged petitioner in a habeas corpus action on the ground that he had completely served a prison sentence, did the Court of Appeals (Third Circuit) have jurisdiction to determine that petitioner is entitled to some credit toward his sentence even though not enough to warrant immediate discharge from custody?

4. Where petitioner, concurrently serving two sentences, one for probation and a second for a prison term, is released from prison on bail pending post-conviction proceedings testing the validity of the conviction underlying the prison term and is compelled by his probation officer to report not only as required by the terms of the probation order but in addition to report in the same manner as one on parole or conditional release, is petitioner entitled to credit toward his prison sentence as a matter of simple equity and of Due Process of Law under the Fifth Amendment for the full period of time during which he was subject to the unlawful restraints imposed by the probation officer and for the time elapsed between his efforts to surrender and the date he was taken into custody.

STATEMENT

A. Petitioner's original confinement, release on bail, surrender, and release on habeas corpus by the District Court for Eastern Pennsylvania.

On September 3, 1952, petitioner pleaded *nolo contendere* to an indictment found in the District of Nevada alleging a violation of Sec. 145(b), I.R.C. 1939, for the year 1949. The sentence was a fine, which was paid, and probation for a period of five years, the condition of which was that petitioner should report every 60 days to the federal probation officer. There was no violation of any conditions of this probation (R. 50, 65).

Thereafter, on December 14, 1953, petitioner pleaded guilty to two indictments found in the Western District of Texas, alleging violations of § 145(b), I.R.C. 1939, for the years 1947 and 1948. The sentence was a fine of $20,000, which was paid, and concurrent sentences of five years' imprisonment, to be followed by three years of probation. Petitioner was immediately committed (R. 54-47), and received at the United States Penitentiary at Leavenworth, Kansas, on December 19, 1953 (R. 50, 78).

Following the decision in *Berra* v. *United States*, 351 U.S. 131, 133, where both parties agreed that § 3616(a), I.R.C. 1939, applied to income tax returns, petitioner in August 1956 moved under 28 U.S.C. § 2255 to correct his Texas sentence on the ground that it was excessive under § 3616(a). This motion being denied, and bail pending appeal being denied by two courts (R. 50-51), petitioner applied to this Court for bail, which was granted over the Government's objection (352 U.S. 1028).

Petitioner furnished the required bond (R. 54-59), and, on March 19, 1957, was released from prison (R. 51, 60-61, 78). On that date, he had three months and 20 days left to serve (R. 31a).

Subsequently this Court held in *Achilli* v. *United States*, 353 U.S. 373, that § 3616(a) did not apply to income tax cases. Thereafter, the Fifth Circuit affirmed the denial of petitioner's motion to correct his sentence (*Binion* v. *United States*, 245 F. 2d 466), and on October 14, 1957, this Court denied certiorari to review that holding. 355 U.S. 834. Promptly thereafter, on October 16, petitioner surrendered to the United States Marshal in Philadelphia. (R. 51-52.)

Immediately following, petitioner brought habeas corpus. The District Court (Welsh, J.) issued the writ on the following day after a preliminary hearing, and released petitioner on bail, later writing a comprehensive opinion sustaining the writ. (R. 48-49; Appendix E, *infra*, pp. 20a-26a).

B. Restraints imposed on petitioner while released on bail, March 19 to October 23, 1957.

From March 21, 1957, two days after his release from Leavenworth, until October 23, 1957, five days after his release from the custody of the United States Marshal at Philadelphia by order of Judge Welsh, petitioner reported to Mr. Hubert A. Boyd, the Chief U. S. Probation Officer in Las Vegas, Nevada, who, in addition to requiring him to report every 60 days under the terms of his 1952 Nevada sentence, also required him to report by personal contact not less than once a week during this period. Petitioner reported faithfully and conscientiously throughout, just as any parolee or conditional releasee (R. 71, 75-77).

The Probation Officer's Contact Log (R. 61-64) shows that on March 21, 1957 he instructed petitioner to report and register, and that two days later petitioner reported in person (R. 61). For the next six months, according to the Probation Officer, petitioner was "under close supervision" (R. 65).

According to the Probation Officer (R. 75),

> "This case was handled in the same manner as any person who has been released from a penitentiary under supervision of a parole officer.
>
> "First, he was under supervision of this officer by reason of the probation imposed upon him on September 3, 1952, which terminated September 13, 1957. [This was pursuant to the Nevada sentence, see R. 50.]
>
> "Secondly, in addition to the requirements of probation, I required L. B. Binion to report by personal contact not less than once a week from his release date of March 19, 1957 until October 23, 1957. Therefore, Binion reported to me in the same manner as I would require a parolee or CR [conditional releasee] to report for supervision. This was particularly required of Binion because no information was available relative to his status."

On September 3, 1957, the five year probationary period imposed by the U. S. District Court for Nevada (R. 50) ended by its terms. The events that followed are reflected by the following entries in the log of Chief U. S. Probation Officer Boyd (R. 63):

> "9- 3-57—Termination date of Probation. Court not in session on CR matters until Friday, September 13. Informed Mrs. Binion I would present motion at that time.

"9-13-57—Probation terminated at Carson City.

"9-17-57—Letter written to Binion relative to termination of probation.

"9-19-57—Binion reported that the had received letter and information on termination of probation and asked if he should continue submitting reports.

I advised him to continue reporting until I had written to the Parole Board and to Mr. Gilpin, CUSPO at San Antonio, Texas for advice."

Boyd wrote two letters on September 19, as he had recorded in the log.

One letter, to Chief U. S. Probation Officer Gilpin of the Western District of Texas—the sentence from which Binion was released on bail by this Court (R. 50-51, 52-61)—read in pertinent part as follows (R. 6-67):

"The above named subject has completed his probationary period in the District of Nevada in a satisfactory manner, and the proceedings were terminated on September 13, 1957. * * *

"I am not aware as to whether or not I am to consider the subject as serving under Conditional Release or Parole, or if he is to be immediately placed under active supervision in the Western District of Texas.

"Binion is living here in Las Vegas, expects to make this his home and will be in business in this District.

"Do you wish to have the probationer continue submitting written reports to my office?"

Probation Officer Gilpin replied on the following day (R. 67-68):

> "As soon as Mr. Binion completes his parole or his conditional release supervision which ever his status may be, his three-year period of probation supervision will then begin. When you receive a reply to your letter of September 19, 1957 addressed to Mr. McDermott and determine Mr. Binion's status from the standpoint of the termination date of such status, I will appreciate hearing from you relative to transfer of probationer's file."

Boyd's second letter of September 19 was addressed to Mr. William K. McDermott, Parole Executive, United States Board of Parole. It read, in pertinent part (R. 64-66):

> "The above named subject has been reporting to this office since his release date from prison on March 19, 1957, and been under close supervision * * *.
>
> "Mr. Binion has reported to me since termination of his probation in Nevada and stated that he did not wish to be in any violation of the Law, and asked if he should submit written reports to this or any other office.
>
> "I would appreciate being instructed as to how I should proceed with this matter."

Probation Officer Boyd's log reflects the concern felt by petitioner over Mr. McDermott's delay in replying to the foregoing inquiry (R. 63-64):

> "9-23-57—Notified Binion to keep reporting to me until I hear from the Parole Board. Subject expressed concern over the fact that he did not want to violate any rules by not reporting.

"9-27-57—Advised Binion that I expected to hear shortly from the Parole Board and to keep reporting once or twice a week until further advised.

"10-4-57—Subject reported and expressed concern over not having heard from the parole Board relative to his status."

Petitioner filed his first petition for a writ of habeas corpus immediately thereafter, on October 16, and the writ was granted the next day with petitioner's bail fixed at $5000 pending a hearing (R. 48).

Four days later, on October 21, 1957, Mr. McDermott, the Parole Executive, *finally* replied to Probation Officer Boyd's September 19 inquiry (R. 68-69). After stating that reports made by petitioner to Probation Officer Boyd since March 19 "have not been made on the basis of any request or order by the United States Board of Parole since no action granting parole has been entered in Mr. Binion's case," Mr. McDermott continued:

> "We have received information to the effect that Mr. Binion surrendered himself to the United States Marshal on October 16, 1957, for return to confinement but subsequently filed a writ in order to contest this matter, and we believe that he has been released on $5,000 bailed for subsequent hearing on the writ. Since he is not considered to be in custody of the Attorney General while out on bail, there will be no requirements as far as the Board of Parole is concerned for any reporting to your office."

The last reports made by petitioner, following his release on bail by the United States District Court

for the Eastern District of Pennsylvania, appear in Probation Officer Boyd's log as follows (R. 64):

> "10-20-57—Subject reported.
> "10-23-57—Received word from Parole Board that subject is not required to submit reports to this office. I so advised Binion."

As has been indicated the latter court (Welsh, D.J.) sustained the writ, saying (Appendix F, *infra*, pp. 23a, 24a):

> "The heart of the matter is that, when relator was released on bond by order of the Supreme Court he was under no restraint other than the usual limitation of action imposed on one released on bail. But, the Nevada Probation Officer required relator to report in the same manner as a parolee from March 19, 1957, to October 23 1957, a period far greater than the three months and eighteen days remaining to be served under his sentence. Since reporting on parole is an ameliorated imprisonment, unless other factors in this case affect our judgment, we believe that relator earned confinement time during that period, and is now entitled to his release. * * *
>
> "The respondent [U. S. Marshal in Philadelphia] is thoroughly familiar with the principle [that living as a parolee under supervision is constructive custody and not liberty] but argues that it is inapplicable in this case since relator was not on parole. The answer to this argument is that while he was not on parole de jure he was so de facto and bound to conduct himself accordingly. We deem such circumstances sufficient to justify application of the same principle."

C. Petitioner's first appeal to the Third Circuit.

The formal order of release was entered on December 22, 1958 (R. 49). No appeal was noted by the

Government until February 19, 1959 (R. 49), and the time for docketing that appeal was extended (R. 49). In fact, the Government's brief and appendix on appeal were not filed in the Third Circuit until May 29, 1959, five months after the formal judgment for petitioner's release.

That court reversed (Appendix E, *infra*, pp. 14a-20a). The Third Circuit agreed that petitioner was entitled to credit toward his prison sentence for the restraints imposed upon him—but only for the time after the probation sentence expired. It found, as a fact, that all of the restraints imposed on petitioner prior to September 3, 1957, related to the probation sentence, notwithstanding the probation officer's statement of two restraints (R. 75).

None the less, in the view of the Third Circuit petitioner was seeking "double credit—for completion of his probation and completion of his sentence of imprisonment for the same reporting to or contact with his probation officer" (Appendix E, *infra*, p. 17a). The Third Circuit did, however, give petitioner credit for 50 days for the period he was under restraints from September 3 to October 23, 1957.

After rehearing was denied, petitioner applied to this Court for certiorari (No. 88, Oct. T. 1959), presenting this single question (Pet. 2):

> "Where the evidence in a case is entirely documentary, and the case is tried to the court sitting without a jury, may a Court of Appeals, exercising a broader scope of review than the 'clearly erroneous' test laid down by Rule 52(a), Federal Rules of Civil Procedure, reject the findings of fact made by the District Court and substitute new findings of its own."

Certiorari was denied (363 U.S. 812) on Monday, June 6, 1960.

D. The Marshal's refusal to take petitioner into custody.

Promptly thereafter, on Friday, June 10, 1960, petitioner offered to surrender to Denny L. Sampson, a Deputy United States Marshal for the District of Nevada at Las Vegas (R. 80-81). In the words of the District Judge in the present case (R. 14-15; 188 F. Supp. at 907):

> "Relator [i.e., the present petitioner] was accompanied by his attorney, Harry E. Claiborne, Esq. Relator told Mr. Sampson that he was surrendering on the strength of the order of the United States Supreme Court, denying certiorari. Mr. Sampson asked relator to have a seat, and went in search of legal advice. He shortly returned and told Mr. Claiborne (who was then in the chambers of Judge Foley of this District [of Nevada], seeking to obtain a writ of habeas corpus for relator) that he, the Marshall, had no authority to hold relator, and accordingly would not do so. On the following Monday, Tuesday, and Wednesday, relator repeatedly attempted to surrender to the Deputy Marshall, who refused to take him into custody without process authorizing such action."

During this period, a Mr. Loveland of the Bureau of Prisons advised the Marshal to accept the prisoner, but then this was countermanded before action was taken. (R. 39, 84-85). Meanwhile, on Monday, June 13, 1960, the Court of Appeals for the Third Circuit issued its mandate pursuant to this Court's denial of certiorari, and on July 5, 1960, the District Court for Eastern Pennsylvania ordered petitioner remanded to the custody of the Attorney General. The District Court's order, drafted by the United States Attorney

for Eastern Pennsylvania, specifically recited that "The time remaining to be served shall be computed in accordance with the Opinion of the United States Court of Appeals for the Third Circuit dated December 9, 1959."

E. Petitioner's present habeas corpus and present appeal to the Ninth Circuit.

Finally, on July 12, 1960, petitioner's surrender was accepted (Appendix A, *infra,* p. 1a), thirty-two days from the time he first attempted surrender. He filed a second petition for habeas corpus (R. 3-8), and was admitted to bail (R. 12, 91). Following a hearing, the District Court for the District of Nevada (Halbert, D. J.) discharged the writ, holding that petitioner was entitled to no credit whatever on any sentence in respect of the restraints imposed by the Probation Officer in 1957, disagreeing in that respect both with the Third Circuit, and with the terms of the order prepared by the Government and issued by the District Court for the Eastern District of Pennsylvania pursuant to the mandate of the Third Circuit (R. 11-24; 188 F. Supp. 905).

On appeal, the Ninth Circuit affirmed. It agreed with Judge Halbert that petitioner was not entitled to immediate release, and hence refused to pass on the correctness of the Third Circuit's holding that he had earned 50 days' credit in 1957. The Ninth Circuit said:

> "This leaves only the period from September 3, 1957, to October 23, 1957, to be considered. This totals 50 days. Inasmuch as even under appellant's calculation there were 110 days left to be served upon his Texas sentence when he was released on bail, he would not now be entitled to be released even if he should be given credit for this

50 days upon his sentence. At this time we express neither approval nor disapproval of the holding of the Third Circuit that appellant was entitled to this 50 days credit.

"The petitioner is only entitled to be released under a writ of habeas corpus if he is illegally restrained of his liberty. Under our holding in this case, and regardless of whether the last-mentioned 50-day period is or is not allowed to appellant, he is not now entitled to be released. A further period of time must be served by appellant in order for him to complete his sentence."

REASONS FOR GRANTING THE WRIT

Petitioner, who has now been released from prison for over four and a half years (except for two days in October 1957 and a single day in July 1960) is sought to be returned to custody for a period that cannot be more than 107 days (less than four months) and who under the ruling of another Court of Appeals should not be required to serve more than 57 days (less than two months). Such a course flies in the face of a clearly expressed Congressional policy. Moreover, despite persistent litigation in which are reflected plainly unjustifiable delays by Government officers that aggregate 90 days, there is still no authoritative ruling as to the extent of his obligation. Considerations of justice no less than of sound judicial administration require the intervention of this Court to terminate a course of action that, certainly at this juncture appears to reflect overzealousness than any effort to reassert the symmetry of the law.

First. The Third Circuit gave petitioner credit for 50 days in respect of the restraint imposed on him by a duly authorized Probation Officer in 1957. The Dis-

trict Court in this case held he was not entitled to such credit, and the Ninth Circuit flatly refused to resolve the difference. Thus, if the judgment below stands unreviewed and petitioner once surrenders for a third time, the custodial officers who take him in charge are without guidance as to his proper release date, and he will necessarily be required to bring still a third petition for habeas corpus.

This circumstance, we submit, warrants and indeed requires review. Just as in patent cases a conflict between two circuits concerning the validity or otherwise of the identical patent is a ground for granting certiorari, even when the decision of either court standing alone would not be reexamined here—see Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Kurland & Wolfson ed. 1951) § 354, where the rulings are collected—so here, where two circuits have rendered differing opinions as to the proper length of a single sentence imposed upon a single individual, resolution of the conflict by this Court is appropriate as a matter of orderly judicial administration.

Second. The decision of the court below, denying petitioner credit for the 58 days between his discharge by the District Court for the Eastern District of Pennsylvania and the notice of appeal by the Government, is in direct conflict with the decisions of the Court of Appeals for the District of Columbia, *Harris* v. *Lang*, 27 App. D.C. 84 (1906), of the Court of Appeals for the Tenth Circuit, *White* v. *Pearlman*, 42 F. 2d 788 (C.A. 10, 1930), and of the Court of Appeals for the Second Circuit, *United States* v. *Greenhaus*, 89 F. 2d 634 (C.A. 2, 1937). It is also contrary to the provisions of 18 U.S.C. § 3568. Moreover, the decision be-

low was inconsistent with prior decisions of the same court. *Smith* v. *Swope,* 91 F. 2d 260 (C.A. 9, 1937); *Albori* v. *United States,* 67 F. 2d 4 (C.A. 9, 1933).

Harris v. *Lang, supra,* involved virtually an identical situation to the present case. In *Harris,* the lower court granted a petition for habeas corpus, as was true in the present case. As here, the United States appealed but the Court of Appeals dismissed. The court held in *Harris,* that despite the appeal, the underlying sentences continued to run and had expired by the time of the court's opinion. Therefore, even though the court concluded that the lower court had erroneously released the prisoner, "and, although he did not serve the full period of his imprisonment by reason of his discharge by the court below, the time which he lawfully should have served has now expired. To direct reversal of the order of the court below would be to do a vain thing." 27 App. D.C. at 93. The court below held that petitioner's sentence did not continue to run even to the filing of the Government's notice of appeal. The decisions are in direct conflict with each other.

White v. *Pearlman, supra,* also involved an erroneous release of a prisoner prior to expiration of his term. There, a federal prisoner, although he had been sentenced to five years, was released from prison after a little more than a year through an error by the warden. Two years later federal authorities committed him to Leavenworth Penitentiary to serve his sentence. On petition for habeas corpus, the prisoner claimed and received credit toward his sentence for the two-year period when he had been at liberty. The mistake of the warden there is precisely comparable to the error, so deemed by the Third Circuit, of the District Court for the Eastern District of Pennsylvania. Both the

warden in *White* and the District Judge concluded that the prisoner had served his sentence and released him. The Tenth Circuit held that the sentence continued to run. The court below held to the contrary. The decisions are in direct conflict with each other.

United States v. *Greenhaus, supra,* is identical to *White* v. *Pearlman* in all essential respects. The warden mistakenly released a prisoner who had been sentenced to eight years in the belief that his sentence was only three years. The Court of Appeals for the Second Circuit held that the *prisoner was entitled to credit toward his sentence for the time he was at large* until the error was discovered. The court below held to the contrary. The decisions are in direct conflict with each other.

The decision of the court below is also inconsistent with its own earlier decisions in *Smith* v. *Swope,* 91 F. 2d 260 (C.A. 9, 1937), and *Albori* v. *United States,* 67 F. 2d 4 (C.A. 9, 1933). In each of these, following imposition of a prison sentence by a federal court the prisoner was surrendered erroneously to state authorities and imprisoned for a state offense. The Ninth Circuit held that the federal sentences began to run when imposed and, notwithstanding that they had not been served, the sentences had expired. Those decisions are completely inconsistent with the decision below in the present case where the court held that petitioner can only receive credit if he was in federal custody, "either constructively or otherwise."

The court below relied upon its prior decision in *Patterson* v. *Jones,* 141 F. 2d 319 (C.A. 9, 1944) which recognizes the conflict. That case is clearly distinguishable. In that case, a federal prisoner was released by a District Court on habeas corpus on November 5,

1942. The prisoner claimed credit for all the time from November 5 until April 29, 1943, the date the District Judge signed the Citation on Appeal. But in that case the Government had filed notice of appeal on January 29, 1943. Under the Federal Rules of Civil Procedure this had the effect of staying the judgment. While an ordinary litigant is required by Rule 62(d) to file a supersedeas bond in order to stay a judgment, the United States is not required to give such a bond. Rule 62(e). The notice of appeal was enough for a stay of judgment in *Patterson*, and it is not argued in the present case that petitioner is entitled to credit for any time after the Government filed its notice of appeal. The difference is that in *Patterson* not sufficient time had elapsed prior to the filing of the notice of appeal to terminate the sentence, while here the fifty-eight days did completely run the balance of the sentence.

It is well to note that the Government did not have to permit the sentence to run pending its decision whether or not to appeal. The United States could have sought a stay of the effective date of the District Court order pending appeal. This was precisely what was done and the basis for the decision in *Hunter* v. *McDonald*, 159 F. 2d 861 (C.A. 10, 1947), cert. denied, 331 U.S. 853 (1947).

Furthermore, 18 U.S.C. § 3568 provides that the sentence of imprisonment "shall commence to run from the date on which such person is received at the penitentiary, reformatory or jail for service of said sentence.

"No sentence shall provide any other method of computing the term."

A sentence of imprisonment is stayed only if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail. F. R. Crim. P. Rule 38(a)(2). Indeed if one elects not to commence service he is given no credit for the time he remains in jail. *Baker* v. *Hunter*, 142 F. 2d 615 (C.A. 10), cert. denied 323 U.S. 740; *United States* v. *Cortese*, 244 F. 2d 872 (C.A. 2).

Relator having originally elected to commence service and not being on bail after December 23, 1958, the date of the Court's order, the sentence of imprisonment is not stayed but continues to run and relator is entitled to insist on the benefits of this statute. *Bruno* v. *United States*, 308 U.S. 287 (1939).

Clearly this conflict should be resolved. The issue is one of obvious importance in the administration of federal criminal law. Moreover, it is a question of individual liberty, not only to petitioner, but to others like him. A cardinal principle of criminal law is that once a prisoner's sentence has commenced to run, it continues to run unless there is some valid supervening occurrence. This conflict squarely raises the question whether an erroneous discharge of a prisoner by a District Court is such an event.

Third. This case presents the remarkable and incongruous situation of having *within itself* a conflict among the federal courts of two circuits. The conflict, moreover, concerns a vital question, the jurisdictional power of federal appellate courts in habeas corpus proceedings. The combination of these factors adds up to a question of great importance which ought to be resolved by this Court.

The Court of Appeals for the Third Circuit held that petitioner was entitled to credit toward his prison sentence for the restraint improperly exercised by a United States Probation Officer between September 3rd and October 23rd, 1957. 273 F. 2d 495 (C.A. 3, 1959). To this extent, the Court of Appeals affirmed a District Court decision, holding that petitioner was entitled to credit for a longer period of time, commencing in March, 1957, so that his prison sentence had expired and he was entitled to be discharged. The Court of Appeals disagreed on the period prior to September 3rd. This left some 58 days to be served on the prison sentence so that the judgment of the Court of Appeals was a reversal of the court below.

In the present proceedings, the District Court in Nevada held that the Third Circuit had exceeded its jurisdiction in finding petitioner entitled to credit for the time subsequent to September 3rd. The principle apparently relied upon was this: the Court of Appeals lacks jurisdiction to deal with any intermediate issue that does not entitle the petitioner to his immediate release. The District Court then announced that it respectfully disagreed with the Third Circuit and that petitioner is not entitled to credit for the time after September 3rd. By failing to either disapprove or approve of this decision, the Ninth Circuit left standing the lower court's conclusions on the jurisdictional issue and petitioner's claim of credit for this period.

Apart from the conflict between the two circuits and its peculiarly painful effect upon petitioner, the issue posed is an important one which ought to be resolved by this Court. A question of jurisdiction of the courts is always basic and pervasive. When, as here, the issue of the jurisdiction of the federal appellate courts

in connection with the Great Writ of liberty, it is even more imperative that the matter be determined by the highest Court.

Section 2106 of the Judicial Code, 28 U.S.C. § 2106, provides that:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

This broad grant of power is challenged in this case. The decision of the court below is inconsistent with this Court's own decision in another habeas corpus case, *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206 (1951). There, the lower courts had ordered the state prisoner released on habeas corpus, but this Court vacated that judgment in order to permit the state court to reconsider the case. This intermediate, conditional judgment was authorized by § 2106. A recent Fifth Circuit case openly relied upon § 2106 to modify a district court decision in a habeas corpus case. *McKenna* v. *Ellis*, 289 F. 2d 928 (C.A. 5, 1961).

The question posed is obviously one of substantial importance. It can be answered effectively and conclusively only by this Court.

Fourth. "[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." *Ex parte Lange*, 18 Wall. (85 U.S.) 163, 173. Petitioner herein contends that he is being twice punished

for the same offense. His claim rests upon the fact, which cannot be denied, that a United States Probation Officer, acting in his official capacity, subjected petitioner to restraint from March to October 1957 in connection with a prison sentence which had less than four months to run. Petitioner claims, as a matter of simple equity, and on the strength of the Fifth Amendment of the United States Constitution, that he cannot be further punished for that offense.

While free on bail from a prison sentence with three months and 20 days to be served prior to the mandatory release date, petitioner was treated by the Probation Officer as if he had been released on parole or conditional release. The Probation Officer erroneously ordered petitioner to report not less than once a week (even though he was told by the Court to treat him as an ordinary probationer, he did not do so (R. 44)), and this reporting continued for over seven months.

The Government has a standard response which has been used time and again with varying success. According to the Government, it all turns on the fact that the Probation Officer did not have authority[1] to impose

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[1] The district court in Nevada stated that the Court of Appeals for the Third Circuit was in error in holding that the improper actions of a probation officer is indistinguishable from those of marshals, wardens or other officers, because the probation officer was "without any authority" to restrain petitioner. The short answer is found in the applicable statutes, 18 U.S.C. §§ 3653-3656, and the U.S. Probation Officers Manual, p. 34, which reads as follows: "In the performance of his duties in connection with probation the probation officer is regarded as the official representative of the United States District Court and the Administrative Office of the United States Courts; and in the performance of his duties in connection with parole investigations and supervision he is regarded as the official representative of the Department of Justice."

any restraints on petitioner. The Government consistently refuses to acknowledge that a federal official, acting in his official capacity, can do something he is not "authorized" to do, *i.e.*, make a mistake, and still bind the Government.

Through this monotonous incantation of the word "authority" the Government conveniently ignores the whole line of cases in the Courts of Appeals and District Courts which have held in favor of prisoners seeking relief on the basis of mistakes or errors by federal officers acting in their official capacities. *E.g.*, *Smith* v. *Swope*, 91 F. 2d 260 (C.A. 9, 1937); *United States* v. *Greenhaus*, 89 F. 2d 634 (C.A. 2, 1937); *Albori* v. *United States*, 67 F. 2d 4 (C.A. 9, 1933); *White* v. *Pearlman*, 42 F. 2d 788 (C.A. 10, 1930); *Price* v. *McGuiness*, 269 Fed. 977 (C.A. 3, 1920); *Harris* v. *Lang*, 27 App. D.C. 84 (C.A.D.C. 1906); *United States* v. *Jones*, 147 F. Supp. 268 (D. Md. 1957); *In re Jennings*, 118 Fed. 479 (E.D. Mo. 1902). Compare *Stetson* v. *Mahoney*, 42 F. Supp. 298 (E.D. Wash. 1942). No attempt is ever made really to distinguish these cases. If their existence is recognized, the Government will conveniently conclude that, *contrary to the argument it advanced at the time they were decided*, the federal officials in each one of them had "authority."

The definition of "authority" in the lexicon of the Government seems to be this: if the prisoner wins, the officer had "authority"; if the Government wins, he did not. The bitter irony is that this thin veneer of an argument has so far prevented petitioner from receiving the credit to which he is entitled for the sentence he has already served.[2]

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[2] Acceptance of the foregoing contentions in no sense involves the proposition that the Government has so consistently argued in this case, viz., that the Probation Officer could not grant petitioner

The issue of human liberty presented here is an important one. It has Constitutional significance. The Government will obviously go on ignoring or spuriously distinguishing lower court decisions until such time as this Court considers the problem of the effect upon a prisoner's sentence of an error by a federal officer acting in his official capacity.

Finally, this case lends itself to summary disposition under a formula espoused by the Fifth Circuit that was here rejected by the Ninth.

In *Powell* v. *Wiman*, 287 F. 2d 275, 282, the Fifth Circuit granted relief in a somewhat similar situation under the terms of the habeas corpus statute, as follows:

> "Powell has now been imprisoned for more than five years. With good time and other allowances, his sentence will probably expire within less than another year. The Court's duty upon a habeas corpus is to 'dispose of the matter as law and justice require.' 28 U.S.C.A. § 2243; cf. 28 U.S.C.A. § 2106. From the present record, without more, it would appear that Powell's discharge will best serve the ends of justice."

So here: This petitioner's sentence is, at the outside, far less than a year. If the Third Circuit is right, it is 57 days, less than two months.[3] If the District Court

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parole. Petitioner has never for a moment contended the contrary. His position is that, not that he was ever a parolee, but that, since parole and conditional release are equivalents by statute (18 U.S.C. § 4164), and since he was subjected to actual restraints that amounted to ameliorated imprisonment, he has already served more time than he was required to serve.

[3] When released in March 1957, petitioner had 3 months and 20 days to be served—110 days. He was in custody on October 16 and 17, 1957, in Philadelphia, and on July 12, 1957, at Las Vegas, which reduces the time to 107 days. The Third Circuit gave him credit for 50 days, making the total 57 days.

for Nevada is right (and the court below did not disturb its judgment), then 107 days remain, less than four months.

The courts have indicated that there is a policy against requiring any prisoner to serve his time in installments. *White* v. *Pearlman*, 42 F. 2d 788, 789 (C.A. 10); *United States* v. *O'Donovan*, 107 F. Supp. 347, 350 (E.D. Ill.); *McDonald* v. *Lee*, 217 F. 2d 619, 623 (C.A. 5), vacated because moot, 349 U.S. 948.

Petitioner's release without more is additionally appropriate because the record reflects unjustifiable delay in this matter on the part of the Government, amounting to some 90 days.

We do not include in that computation the 58 days the Government took to note the first appeal (R. 49), for that was within the 60 days allowed by Rule 73(a), F. R. Civ. P., in Government cases. We do include, however, its 58-day delay in filing the record and brief on the first appeal.[4] And we similarly include the 32 days' delay in accepting petitioner in custody following the conclusion of the first appeal, from June 10 to July 12, 1960.

There was no justification for the Nevada Marshal's refusal to accept petitioner. This was his duty and no further commitment was necessary. Cf. *Hill* v. *Wampler*, 298 U.S. 460, 465 (1936). The Marshal in Philadelphia accepted petitioner's surrender on Octo-

[4] Rule 21(1) of the Third Circuit incorporates the 40-day period of Rule 73(g), F. R. Civ. P. Since the first appeal was noted on February 19, 1959, that period would expire on April 1. In fact, the Government's brief and appendix were not filed in the Third Circuit until May 29—58 days later, or 98 days after the appeal was noted.

ber 16, 1957, two days after this Court's denial of certiorari in *Binion* v. *United States*, 355 U.S. 834; there was no reason whatever why the Marshal in Las Vegas should not similarly have accepted petitioner four days after this Court's denial of certiorari in *Binion* v. *O'Brien*, 363 U.S. 812. The latter Marshal's testimony (R. 85) that "it might constitute an illegal arrest" to take one who voluntarily surrendered, clearly a belated excuse, reflects no legal reason but only official irresponsibility. It scarcely needs to be added that, on this Court's denial of a petition for certiorari, no formal mandate issues. Rule 25(2).

Since, therefore, assuming, *arguendo*, only 107 or 57 days remain to be served, and since the Government has been responsible, without justification, for delays aggregating 90 days, we submit that, as in *Powell* v. *Wiman*, 287 F. 2d 275, *supra*, justice requires that this Court grant certiorari, reverse the judgment below, and, on the authority of 28 U.S.C. § 2243, direct that petitioner be released forthwith.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

JACOB KOSSMAN,
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Philadelphia 7, Pa.,
Attorney for the Petitioner.

September 1961.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17,179

June 26, 1961

UNITED STATES OF AMERICA, EX REL. L. B. BINION, *Appellant*,

v.

UNITED STATES MARSHAL FOR THE DISTRICT OF NEVADA,
Appellee.

On Appeal from the United States District Court
for the District of Nevada

Before: HAMLIN, JERTBERG and MERRILL, Circuit Judges.

HAMLIN, Circuit Judge:

On June 12, 1960, L. B. Binion, appellant herein, was taken into custody by the United States Marshal for the District of Nevada, appellee herein, upon a judgment and commitment entered in the United States District Court for the Western District of Texas on December 14, 1953. On the same day appellant filed a petition for a writ of habeas corpus in the United States District Court for the District of Nevada in order to test the validity of his detention, and he was immediately released on bail. On November 9, 1960, the district court discharged the writ, and on November 10th appellant appealed to this court.[1]

The record discloses an undisputed, but yet complicated, factual situation. On September 3, 1952, appellant entered a plea of nolo contendere in the United States District Court for the District of Nevada to an indictment charging income tax evasion for the year 1949. He was sentenced to pay a fine of $15,000, the imposition of a prison sentence

[1] The district court had jurisdiction under the provisions of 28 U.S.C.A. § 2241, and this court has jurisdiction of the appeal under the provisions of 28 U.S.C.A. § 1291.

was suspended, and he was placed on probation for five years.

On December 14, 1953, in the United States District Court for the Western District of Texas, appellant pleaded guilty to two indictments charging income tax evasion for the years 1947 and 1948. A fine of $20,000 was imposed, and he was sentenced to three concurrent terms of five years each to be followed by probation for three years. He commenced the service of the sentences on December 14, 1953.

In August, 1956, appellant filed a motion under 28 U.S.C.A. § 2255 to correct the Texas sentences, alleging that they were excessive. The district court denied this motion and an appeal was taken to the Court of Appeals for the Fifth Circuit.[2] On March 11, 1957, upon the application by appellant, the Supreme Court granted his release on bail pending final decision. Accordingly, on March 19th appellant was released on $25,000 cash bail. On that day, according to appellee, there remained 3 months 27 days to be served on the Texas sentences prior to eligibility for mandatory release under the provisions of 18 U.S.C.A. § 4164.[3]

On June 28, 1957, the Court of Appeals for the Fifth Circuit affirmed the district court's denial of appellant's motion to correct sentence,[4] and the Supreme Court sub-

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[2] At that time *United States* v. *Achilli*, 234 F. 2d 797 (7th Cir. 1956), which involved the same question, was pending before the United States Supreme Court; and the Fifth Circuit entered an order deferring a determination of appellant's case pending a decision by the Supreme Court in *Achilli*.

[3] Appellant contends that at that date he had only 3 months and 20 days remaining to be served, but in our view of the case the discrepancy is immaterial at this time.

[4] The opinion of the court is reported as *Binion* v. *United States*, 245 F. 2d 466 (5th Cir. 1957), and is based on the fact that the Supreme Court decided the Achilli case contrary to appellant's contention. *Achilli* v. *United States*, 353 U.S. 373 (1957).

sequently denied certiorari.[5] On October 16, 1957, appellant surrendered to the United States Marshal at Philadelphia, Pennsylvania, and on the same day he filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. He was released on bail in the sum of $5,000 pending hearing on the petition, and order to show cause why the writ should not be granted having been issued.

At the time of the hearing on the order to show cause, sixteen exhibits and a stipulation signed only by appellant's counsel were admitted into evidence, no witnesses being called by either side. From these exhibits and the stipulation it appeared that appellant, upon his release on bail on March 19, 1957, reported to the probation officer for the District of Nevada in accordance with the order of the United States District Court for Nevada made September 3, 1952, placing appellant on probation for five years and requiring him to report once every 60 days. The probation officer requested appellant to report once a week, a request with which appellant complied. On September 3, 1957, the five-year probation period terminated and on September 13, 1957, an order to that effect was signed by the district court. The probation officer, nevertheless, instructed Binion to continue reporting weekly pending clarification of his status. On September 19, 1957, the probation officer wrote to the United States Board of Parole stating that appellant was continuing to report to him and requesting information as to his status. The Board of Parole replied on October 21, 1957, advising that appellant was not reporting pursuant to any order or request by the Board; that he was not in the custody of the Attorney General while free on bail; and that, consequently, there was no requirement by the Board that he report to

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[5] *Binion* v. *United States*, 355 U.S. 384 (1957).

the probation officer. Binion was advised of this communication on October 23 and did not report thereafter.[6]

On the basis of this evidence, the District Court for the Eastern District of Pennsylvania held that appellant should be given credit on his sentence for the period from March 19, 1957, to October 23, 1957, and that therefore appellant's sentence had been completed, and he was entitled to be released. Accordingly, on December 22, 1958, the district court signed an order discharging appellant from custody. The government appealed from this order and the Court of Appeals for the Third Circuit reversed the district court on December 9, 1959, holding that appellant was not entitled to credit for the period from March 19, 1957, to September 3, 1957, (while his probationary period was still in effect) but that he was entitled to credit for the period from September 3, 1957, to October 23, 1957.[7] The application of appellant for certiorari was denied on June 6, 1960.[8]

On June 10, 1960, appellant attempted to surrender to a Deputy United States Marshal for the District of Nevada who, after consultation with the United States Attorney, refused to accept him. On June 13, 1960, the Court of Appeals issued its mandate and on July 5, 1960, the district court ordered appellant remanded to the custody of the Attorney General. On July 12, 1960, appellant was taken into custody, but immediately filed a petition for a writ of habeas corpus and was admitted to bail.

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[6] During the period from March 19, 1957, through October 23, 1957, appellant left the District of Nevada on six occasions, making trips to Pennsylvania, California and Montana. During one absence he stayed at his ranch in Montana for a period of two and one-half months and made contact with the probation officer by telephone.

[7] *United States ex rel. Binion* v. *O'Brien*, 273 F. 2d 495 (3d Cir. 1959).

[8] *Binion* v. *O'Brien*, 363 U.S. 812 (1960).

On August 15, 1960, a hearing was held in the District of Nevada, at which the evidence set out above was received. On November 9, 1960, the district court discharged the writ of habeas corpus and remanded appellant to the custody of the marshal. Appellant immediately filed a notice of appeal to this court and was released on bail.

Appellant's contention that he has completed service of the sentence imposed in the Texas court is based upon his claim that he was in custody and therefore entitled to credit upon his sentence for three separate periods of time. His first contention is that he is entitled to credit from December 22, 1958 when he was discharged from custody by the District Court of Pennsylvania, until the government's appeal from the district court's order was filed. Secondly, he contends that he is entitled to credit against his sentence for the period from March 19, 1957, through October 23, 1957, when he was reporting to the Nevada probation officer. Thirdly, he contends that he is entitled to credit against his sentence for the period from June 10, 1960, when he unsuccessfully attempted to surrender to the United States Marshal, throagh July 12, 1960, when he was finally taken into custody by the Marshal.

The claim of appellant that he is entitled to credit upon his term from the time of the district court's order discharging him through the time when the government took its appeal cannot be sustained. A similar contention was made in *Patterson* v. *Jones*, 141 F. 2d 319 (9th Cir. 1944), and this court ruled adversely to the appellant's contention, citing *Anderson* v. *Corall*, 263 U.S. 193 (1923); *United States* v. *Greenhaus*, 89 F. 2d 634 (2d Cir. 1937); *In re Collins*, 8 Cal. App. 367, 97 Pac. 188 (1908); *Ex parte Vance*, 90 Cal. 208, 27 Pac. 209 (1891); *Dolan's Case*, 101 Mass. 219; and *Minnesota* v. *Jorgensen*, 176 Minn. 572, 224 N.W. 156 (1929). During the period from appellant's discharge by the district court in Pennsylvania until the time of the government's appeal from that order, appellant

was not in custody, either constructively or otherwise, and can receive no credit upon his Texas sentence for that period of time.

Similarly, appellant can receive no credit upon his sentence for the period between June 10, 1960, when he attempted to surrender (with his attorney present to file an immedite petition for habeas corpus), and July 12, 1960, when he was taken in custody by the marshal. It appears that on June 10th appellant entered the office of the United States Marshal in Las Vegas, Nevada, and told the marshal that he was surrendering on the strength of the order of the United States Supreme Court denying certiorari. The marshal asked him to have a seat and went in search of legal advice. Shortly thereafter he returned and told appellant that he had no authority to hold him and would not do so. At that time neither the United States Marshal nor the United States District Court had received any communication of any kind from the Supreme Court that the petition of appellant for certiorari had been denied. He only had the statement of appellant to that effect.[9] It was not until July 5, 1960, that the United States District Court for the Eastern District of Pennsylvania ordered appellant to be remanded to the custody of the Attorney General of the United States. From June 10, 1960, to July 12, 1960, appellant was not in custody, either actually or constructively, and this time cannot be credited upon his sentence.

The last period to be considered—from March 19, 1957, to October 23, 1957, when appellant was reporting to the

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[9] Sup. Ct. R. 59(3). "In cases coming from federal courts, a formal mandate shall not issue unless specially directed. In the absence of such direction, it shall suffice for the clerk to send to the proper court, within the time and under the conditions set out in paragraph 2 of this rule, a copy of the opinion or order of this court, and a certified copy of the judgment of this court, which in cases under this paragraph shall include provisions for the recovery of costs if any are awarded."

probation officer in Nevada—may properly be divided into two periods: (1) from March 19, 1957, to September 3, 1957; and (2) from September 3, 1957, to October 23, 1957. During the first of these two periods the five-year period of probation fixed by the District Court of Nevada in 1952 was still in effect. One of the terms of that probation required appellant to report once every 60 days to the probation officer. However, it is admitted that during this period, and indeed until October 23, 1957, the probation officer requested appellant to report either in person or by telephone at least once a week, and appellant did so report.

In *United States ex rel. Binion* v. *O'Brien*, *supra*, the Third Circuit in considering the first of these two periods, stated that Binion "was a probationer under the Nevada sentence which clearly required reporting to his probation officer," and that during this time "he had a duty to report, for the Supreme Court's action on his request for bail did not purport to affect his status as a probationer under the Nevada sentence, but rather only went to his status under the Texas sentence." The Third Circuit further held that the frequency of the reporting during this period did not create a different status for Binion. Consequently, that court held that during that time up until September 3, 1957, Binion was entitled to no credit upon his Texas sentence. With this holding of the court in that case we agree.

This leaves only the period from September 3, 1957, to October 23, 1957, to be considered. This totals 50 days. Inasmuch as even under appellant's calculation there were 110 days left to be served upon his Texas sentence when he was released on bail, he would not now be entitled to be released even if he should be given credit for this 50 days upon his sentence. At this time we express neither approval nor disapproval of the holding of the Third Circuit that appellant was entitled to this 50 days credit.

The petitioner is only entitled to be released under a writ of habeas corpus if he is illegally restrained of his liberty. Under our holding in this case, and regardless of whether the last-mentioned 30-day period is or is not allowed to appellant, he is not now entitled to be released. A further period of time must be served by appellant in order for him to complete his sentence.

The judgment of the district court discharging the writ of habeas corpus is affirmed.

(Endorsed) Opinion Filed June 26, 1961.

FRANK H. SCHMID, *Clerk*.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17179

UNITED STATES OF AMERICA, EX REL. L. B. BIXION, *Appellant*.

v.

UNITED STATES MARSHAL FOR THE DISTRICT OF NEVADA, *Appellee*.

Judgment

Appeal from the United States District Court
for the District of Nevada

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and entered June 26, 1961
FRANK H. SCHMID, *Clerk*

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, August 4, 1961

Before: Hamlin, Jertberg, and Merrill, Circuit Judges

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed July 21, 1961 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is, denied.

APPENDIX D

United States Constitution, Fifth Amendment:

No Person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

Title 28, U.S.C.:

§ 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. * * *

§ 2243. Issuance of writ; return; hearing; decision

* * *

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

Title 18, U.S.C.:

§ 3568. Effective date of sentence

The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence.

If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

No sentence shall prescribe any other method of computing the term.

§ 4163. Discharge

A prisoner shall be released at the expiration of his term of sentence less the time deducted for good conduct. A certificate of such deduction shall be entered on the commitment by the warden or keeper.

§ 4164. Released prisoner as parolee

A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days. • • • (As amended, June 29, 1951, c. 176, 65 Stat. 98)

§ 4203. Application and release; terms and conditions

(a) • • • Such parolee shall be allowed in the discretion of the Board, to return to his home, or to go elsewhere, upon such terms and conditions, including personal reports

from such paroled person, as the Board shall prescribe, and to remain, while on parole, in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which he was sentenced. • • •

§ 4042. Duties of Bureau of Prisons

The Bureau of Prisons, under the direction of the Attorney General, shall—

(1) have charge of the management and regulation of all Federal penal and correctional institutions;

(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;

• • •

§ 4086. Temporary safe-keeping of federal offenders by marshals

United States marshals shall provide for the safe-keeping of any person arrested, or held under authority of any enactment of Congress pending commitment to an institution.

Federal Rules of Criminal Procedure:

Rule 38. Stay of Execution, and Relief Pending Review

(a) Stay of Execution.

• • •

(2) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail.

• • •

Rule 62. Stay of Proceedings to Enforce Judgment

• • •

(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay
• • •

(e) Stay in Favor of the United States or Agency Thereof. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

• • •

Rules of the United States Supreme Court:

Rule 25. Order Granting or Denying Certiorari.

• • •

2. No mandate issues upon the denial of a petition for writ of certiorari. Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record. Such notification will not be withheld pending disposition of a petition for rehearing except by order of the court or a justice thereof.

Rules of the United States Court of Appeals for the Third Circuit:

Rule 15. Custody of Prisoners Pending Appeal in Habeas Corpus Proceedings.

• • •

(3) If Prisoner Discharged. Pending review of a decision discharging a prisoner on habeas corpus, he shall be enlarged upon recognizance, with surety, for his appearance to answer and abide by the judgment in the appellate proceedings; and if in the opinion of the court or judge rendering the decision surety ought not to be required the personal recognizance of the prisoner shall suffice.

(4) Upon Review in Supreme Court. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in this court but also the further possible review in the Supreme Court; * * *

Rule 36. Mandate.

* * *

(2) Certiorari to Supreme Court—Duration of Stay.

In any case where a stay of the mandate is applied for on the ground that it is desired to make application to the Supreme Court of the United States for a writ of certiorari, such stay will be made for a further period of 30 days, and if within the said period of 30 days, there shall be filed with the clerk of this court a certificate from the clerk of the Supreme Court to the effect that there has been filed in that court the certiorari petition, record and brief, and proof of notice thereof as required by the Supreme Court, the stay of the mandate of this court shall continue until final disposition of the case by the Supreme Court. Immediately upon the filing in this court of a copy of the order by the Supreme Court denying the writ applied for, the mandate of this court shall be issued.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,891

UNITED STATES OF AMERICA, EX REL. L. B. BINION

v.

WILLIAM A. O'BRIEN, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA, *Appellant.*

On Appeal From the United States District Court for the Eastern District of Pennsylvania

---

Argued October 6, 1959

Before BIGGS, *Chief Judge*, and MCLAUGHLIN and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed December 9, 1959)

By STALEY, *Circuit Judge.*

This is an appeal by the government from the grant by the district court of a writ of habeas corpus. It presents the unique problem of a relator who asserts that he is entitled to credit on his sentence for the period he was subjected to supervision by a federal probation officer while on bail from that sentence.

The relator, Binion, was indicted for evasion of his income tax for the year 1949 in violation of Section 145(b) of Title 26, U.S. Code, 26 U.S.C.A. (1939) § 145(b). He entered a plea of nolo contendere in the United States Dis-

trict Court for the District of Nevada on September 3, 1952, and was sentenced to pay a fine, which was duly paid, and placed on probation for a period of five years from September 3, 1952, to September 3, 1957. The probation was conditional upon Binion's reporting every sixty days to the federal probation officer, and there was no violation of any of the conditions of the probation.

Thereafter, on December 14, 1953, Binion pleaded guilty to two indictments charging income tax evasion for the years 1947 and 1948. He was fined $20,000 and sentenced to three imprisonment terms of five years each, to run concurrently, and to be followed by probation for three years. Service of the sentences commenced the same day, when he was committed to the custody of the Marshal for the Western District of Texas.

After serving more than two and one-half years in the United States Penitentiary at Leavenworth, Kansas, Binion filed a motion for correction of his sentence pursuant to 28 U.S.C. § 2255. This motion was denied, and an appeal was taken to the United States Court of Appeals for the Fifth Circuit. Action on the appeal was deferred on September 22, 1956, pending the decision of the Supreme Court in Achilli v. United States, 353 U.S. 373 (1957). One month later Binion made application to the district court for release on bail, and his request was denied. Subsequently, on February 14, 1957, the court of appeals also denied his request. Four days later he made application to the Supreme Court, and on March 11, 1957, the Supreme Court admitted him to bail, pending disposition of the Achilli case, upon a bond in the sum of $25,000. The bond having been posted, the United States District Court for the Western District of Texas on March 18, 1957, ordered Binion released, and he was released the following day. At the time of his release he had three months and twenty days remaining to serve on the Texas sentence in order to be eligible for mandatory release.

On March 21, 1957, Binion reported to the Chief United States Probation Officer in Las Vegas, Nevada, and continued to report to him until ordered back to the penitentiary. The Nevada probation order had required him to report to the probation officer every sixty days from September 3, 1952, until September 3, 1957. While free on bail, in addition to the conditions of probation imposed by the Nevada sentence, Binion was required by the probation officer to report by personal contact not less than once a week, and he did so.

The Supreme Court handed down its decision in Achilli v. United States, 353 U.S. 373, on May 27, 1957. In accordance therewith the court of appeals affirmed the district court's denial of the motion to correct Binion's sentence, 245 F. 2d 466 (C.A. 5, 1957). Binion then filed a petition for writ of certiorari which was denied on October 14, 1957, 355 U.S. 834. Two days later he surrendered to the United States Marshal at Philadelphia. However, on the same day, he filed a petition for writ of habeas corpus and was released on October 17 on $5,000 bail pending decision thereon.

The district court found that the Nevada probation officer required relator to report in the same manner as a parolee from March 19 to October 23, 1957, a period far greater than the three months and eighteen days remaining to be served on his sentence of imprisonment.[1] Recognizing that parole is an ameliorated imprisonment, the court was of the opinion that Binion earned confinement time unless there were other factors in the case that would alter the effect of the reporting. The most important "other factor" considered by the district court was Binion's status while out on bail. On this point the district court concluded that

[1] It is agreed that Binion should be credited with the two days he spent in jail in Philadelphia after surrendering to the Marshal, October 16 and 17, 1957. This reduces the remaining time from three months and twenty days to three months and eighteen days.

"when relator was released on bond by order of the Supreme Court he was under no restraint other than the usual limitation of action imposed on one released on bail." Accordingly, the petition for writ of habeas corpus was granted.

The rule which calls upon an appellate court to support findings of fact of a district judge unless clearly erroneous, Fed. R. Civ. Proc. Rule 52(a), is inapplicable insofar as it is bottomed upon the trial court's opportunity to observe the demeanor of the witnesses, for the case was submitted on brief and documents. See United States v. United Steelworkers of America, F. 2d (C.A. 3, decided Oct. 27, 1959). In addition, our review of the ultimate facts is not in any way circumscribed by the clearly erroneous rule.

Initially, we must consider Binion's status when placed on bail by the Supreme Court. We cannot agree with the district court that Binion, when enlarged on bond, was under no restraint other than the usual limitations of one so freed. On the contrary, Binion at that time, March 19, 1957, and until September 3, 1957, was a probationer under the Nevada sentence which clearly required reporting to his probation officer. To ignore the explicit terms of the Nevada sentence would be clearly unwarranted. It is true that, while incarcerated, he was not required to affirmatively report, for in fact he could not do so. However, upon release, the terms of his probation became operative, and he had a duty to report, for the Supreme Court's action on his request for bail did not purport to affect his status as a probationer under the Nevada sentence, but rather only went to his status under the Texas sentence. In essence, Binion desires double credit—for completion of his probation and completion of his sentence of imprisonment for the same reporting to or contact with his probation officer. Since he had a duty to report under the Nevada probation order until September 3, 1957, he cannot be given credit on his later sentence for reporting done prior to that date.

The frequency of the reporting during this period does not create a different status as does a requirement to report when there is no duty to report at all.

This brings us to the period of reporting required by the probation officer following termination of the probation, that is, September 3, 1957, through October 23, 1957. The probation officer requested instructions from the Parole Board Executive in Washington with regard to Binion's status and while awaiting instructions required Binion to continue reporting.[2] As to this period of one month and twenty days, the conclusion of the district court which we have considered above is most apt. Binion had no duty to report and was under no restraint other than hat imposed on one released on bail. Regardless, he was required by the probation officer to continue to report weekly.

The district court found that Binion reported in the same manner as a parolee or a person who was conditionally released for supervision. This finding is based in part upon the statement of the probation officer that "Binion reported to me in the same manner as I would require a parolee or C.R. [conditional releasee] to report for supervision." The court, recognizing that Binion was not on parole de jure, nevertheless concluded on the facts that he was on parole de facto.

The government does not question that parole is in legal effect imprisonment, albeit an ameliorated form thereof, Anderson v. Corall, 263 U.S. 193 (1923); Jenkins v. Madigan, 211 F. 2d 904 (C.A. 7), cert. denied, 348 U.S. 842 (1954); but contends that the status of parole can only be created through the procedures laid down in statutes

[2] The Parole Board failed to reply to this letter of September 19, 1957, until October 21, 1957 (received by the probation officer on October 23, 1957). The letter indicated that Binion was not reporting pursuant to any order or request by the Board and that he was not in the custody of the Attorney General while free on bail.

and regulations. Certainly, this is the case as regards parole de jure. This argument, however, begs the question, for the real issue is whether Binion should be credited with the period during which he was restrained by an officer clothed with the apparent authority to do so.

The government attempts to distinguish the actions of the probation officer here from those of the marshals or wardens in the following cases where credit was given for improper action taken by them. Smith v. Swope, 91 F. 2d 260 (C.A. 9, 1937); Albori v. United States, 67 F. 2d 4 (C.A. 9, 1933); White v. Pearlman, 42 F. 2d 788 (C.A. 10, 1930); Price v. McGuinness, 269 Fed. 977 (C.A. 3, 1920); United States v. Jones, 147 F. Supp. 268 (D.C. Md. 1957); in re Jennings, 118 Fed. 479 (E.D. Mo. 1902). No logical distinction can be drawn between these cases and that at bar. They stand for the proposition that where an individual's liberty is restrained by the act of an officer of the United States having authority to exercise restraint, such individual is entitled to credit for the period of that restraint towards service of his sentence. The probation officer here had actual authority by virtue of the Nevada sentence to require Binion to report during the period of that sentence, i.e., until September 3, 1957. Thereafter, since Binion no longer had the status of a probationer, the officer was devoid of authority to require further reporting. Nevertheless he required relator to do so until October 23, 1957. Based upon the cases cited supra, it appears to us that Binion is entitled to credit on his Texas sentence of imprisonment for that period during which he was required to report following expiration of his Nevada sentence of probation, since his status then was solely that of one released on bail.

The cases cited by the government in regard to estoppel completely fail to support its position, for they involve contract considerations and, of course, are not applicable here where an individual's liberty is at issue. Likewise,

Binion's contention that he has a right not to serve his sentence in instalments is hardly persuasive, for it was his action, vigorously contested by the government, that resulted in his release on bail. We have considered the other points raised by the parties but find them to be insubstantial.

In accordance with the foregoing opinion, the judgment of the district court will be reversed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX F

Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. M-1888

UNITED STATES OF AMERICA, EX REL L. B. BINION

v.

WILLIAM A. O'BRIEN, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA

December 17, 1958.

WELSH, J.

This is the petition of relator, L. B. Binion, for a Writ of Habeas Corpus.

On September 3, 1952, relator pleaded nolo contendere to an indictment charging violation of Title 26 U.S.C., Section 145(b) for the year 1949. The judgment of the United States Court for the District of Nevada was a fine and probation for five years. The fine was paid.

Relator on December 14, 1953, pleaded guilty to two indictments charging violation of Title 26 U.S.C., Section 145(b), by filing fraudulent income tax returns for 1947 and 1948 in the Western District of Texas.

The judgment of the Court was a fine and that he serve three five-year terms concurrently to be followed by a probationary period of three years. The fine was paid.

He was committed to the United States Marshal for the Western District of Texas, pending a definite designation of the place of confinement for service of the sentence imposed, and was delivered to the United States Penitentiary at Leavenworth, Kansas, on December 19, 1953.

In August 1956, in the United States District Court for the Western District of Texas, the relator, pursuant to Title 28 U.S.C., Section 2255, filed a motion to correct sentence on the ground that the five-year sentences were excessive and that sentences not exceeding one year should have been imposed under Title 26 U.S.C., Section 3616(a). This motion was denied and an appeal was taken to the United States Court of Appeals for the Fifth Circuit. On September 22, 1956, the United States Court of Appeals for the Fifth Circuit deferred action on the appeal pending the decision of the Supreme Court in the case of *United States* v. *Achilli*, 234 F. 2d 797. On October 23, 1956, relator made application to the District Court for release on bail, which was denied. On February 14, 1957, application for release on bail was made to the United States Court of Appeals for the Fifth Circuit. This application was also denied. On February 18, 1957, the relator made application to the Supreme Court for release on bail, and on March 11, 1957, the Supreme Court entered an Order admitting him to bail pending the disposition of the Achilli case, upon executing a bail bond in the sum of $25,000.00. On March 18, 1957, bond having been posted, the United States District Court for the Western District of Texas at Austin ordered the release of relator pursuant to the

conditions of the bond, and subject to further orders of that Court and the Appellate Courts. On March 19, 1957, he was released from the United States Penitentiary, Leavenworth, Kansas. At the time of his release there remained three months and twenty days to be served on the Texas sentence imposed by the United States Court of Texas for the Western District, to be eligible for mandatory release by virtue of the statutory good time that he was credited with an addition to thirty-five days additional good time. On May 27, 1957, the Supreme Court affirmed the decision of the lower Court in *Achilli* v. *United States*, 353 U.S. 373. On June 28, 1957, the Court of Appeals for the Fifth Circuit, on the authority of the Achilli decision affirmed the District Court's denial of the motion to correct relator's sentence, 245 F. 2d 466. On July 25, 1957, relator's petition for writ of certiorari was filed in the Supreme Court. On October 14, 1957, the Supreme Court denied the writ of certiorari, 355 U.S. 834. On October 16, 1957, relator surrendered to the United States Marshal at Philadelphia. On October 17, 1957, relator was released from the custody of the Marshal pending the decision on the instant petition for writ of habeas corpus, bail having been fixed in the amount of $5,000.00.

After having been released from the United States Penitentiary on March 19, 1957, relator reported to Hubert A. Boyd, the Chief United States Probation Officer in Las Vegas, Nevada, from March 21, 1957, until October 23, 1957. The condition of probation of the Nevada District sentence of September 3, 1952, was that he should report every sixty days to the United States Probation Officer. There was no violation of any of the conditions of this probation. The Probation Officer, in addition to the requirements of the probation imposed upon relator on September 3, 1952, which continued until September 3, 1957, required relator to report by personal contact not less than once a week from his release date of March 19, 1957, until October 23, 1957, and relator reported in the same manner as a parolee

or a person who was conditionally released for supervision. Relator, during the entire period that he was under supervision, reported faithfully and conscientiously throughout.

Relator's contention is that he is entitled to his release forthwith, on the ground that the United States exercised restraint over him by requiring him to report as a parolee for a longer period than his unexpired sentence.

This is a case of first impression on the facts, but the applicable principles are quite clear. The heart of the matter is that, when relator was released on bond by order of the Supreme Court he was under no restraint other than the usual limitation of action imposed on one released on bail. But, the Nevada Probation Officer required relator to report in the same manner as a parolee from March 19, 1957, to October 23, 1957, a period far greater than the three months and eighteen days[1] remaining to be served under his sentence. Since reporting on parole is an ameliorated imprisonment, unless other factors in this case effect our judgment, we believe that relator earned confinement time during that period, and is now entitled to his release.

The rule that parole is in legal effect imprisonment was first laid down by the Supreme Court in *Anderson* v. *Corall*, 263 U.S. 193:

> Mere lapse of time without imprisonment or other restraint contemplated by the law does not constitute service of sentence * * * The parole authorized by the statute does not suspend service or operate to shorten the term. While on parole the convict is bound to remain in the legal custody and under the control of the

[1] There were two days which relator spent in jail in Philadelphia on October 16 and 17, 1957, after his surrender to the United States Marshal, which reduced the time remaining to be served on the Texas sentence from three months and twenty days to three months and eighteen days.

> warden until the expiration of the term, less allowance, if any, for good conduct. While this is an amelioration of punishment, it is in legal effect imprisonment.

In varying forms, the same principle—that living as a parolee under supervision is constructive custody and not liberty—has been laid down in many other cases. *Jenkins* v. *Madigan*, 211 F. 2d 904; certiorari denied 348 U.S. 842; *Minder* v. *Assistant Director, Bureau of Pardons and Paroles*, 229 F. 2d 432; *United States* v. *Nicholson*, 78 F. 2d 468; certiorari denied, 296 U.S. 573; *United States* v. *Dillard*, 102 F. 2d 94; *United States* v. *Thompson*, 47 F. Supp. 150; affirmed, 135 F. 2d 626, and *Gould* v. *Taylor*, 153 F. Supp. 71.

The respondent is thoroughly familiar with the principle but argues that it is inapplicable in this case since relator was not on parole. The answer to this argument is that while he was not on parole de jure, he was so de facto and bound to conduct himself accordingly. We deem such circumstances sufficient to justify application of the same principle.

The respondent next argues that, so far as the Texas sentence is concerned, the contact relator maintained with the Nevada Probation Officer was strictly a matter between them; it lacked any official sanction or direction by the Parole Board or otherwise and, consequently, is without legal significance in relation to service of the remainder of his sentence. In rejecting this argument we point out that the test is not whether or not relator was granted parole by the Parole Board, but how the actual situation appeared to the relator. Undoubtedly, from his own past personal experiences it must have appeared to the relator that the Nevada Probation Officer had the authority to require the relator to personally contact him not less than once a week during the period in question. It is immaterial that said Officer may have lacked such authority.

It is likewise immaterial, we think, that said Officer was mistaken about relator's status. In *United States* v. *Jones*, 147 F. Supp. 268, the prisoner had elected not to serve his sentence but was taken to the penitentiary by mistake notwithstanding. It was held that the prisoner was entitled to credit for the time actually spent in the penitentiary. Again, in *Price* v. *McGuinness*, 269 Fed. 977, the prisoner was given the same credit for good conduct time for an improper confinement in a jail as if he had been properly confined in a penitentiary.

Finally, the respondent argues that relator's assertion that service of sentence continued after March 19, 1957, is without any support whatsoever for the reason that relator elected not to serve his sentence by petitioning the Court for release on bail. On account of the views already expressed herein we need hardly discuss this argument. It is enough to say, we think, that while relator was freed on bail by the Supreme Court at his own election, had no restraint been imposed upon him by a Federal Officer during the period in question we would have a different case; but in view of the restraint to which he was in fact subjected, it is begging the question to urge that he was at liberty.

Thus, we sustain relator's contention and hold that relator earned confinement time during the period he was required to report to the Nevada Probation Officer in the same manner as a parolee, which time is in excess of the period remaining to be served under his sentence, and is now entitled to his release.

The petition of the relator, L. B. Binion, for writ of Habeas Corpus will accordingly be granted. Counsel for relator will forthwith prepare and submit an appropriate order.

APPENDIX G

IN THE UNITED STATE DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. M-1888. Filed Dec. 23, 1958.

UNITED STATES OF AMERICA, EX REL L. B. BINION

v.

WILLIAM A. O'BRIEN, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Order

And now, to wit, this 22nd day of December A.D. 1958, in accordance with the opinion rendered by this Court dated December 17, 1958, it is ordered, adjudged and decreed, that the petition of the relator, L. B. Binion, for writ of habeas corpus be and the same is hereby granted; it is further ordered that the relator, L. B. Binion, be and is hereby released from custody of the respondent; and it is further ordered that a return to the Writ and further hearings are unnecessary.

WELSH, *J.*

Office-Supreme Court, U.S.
FILED
OCT 23 1961
JAMES R. BROWNING, CLERK

SUPREME COURT, U. S.

No. 407

In the Supreme Court of the United States

OCTOBER TERM, 1961

UNITED STATES OF AMERICA EX REL.
L. B. BINION, PETITIONER
v.
UNITED STATES MARSHAL FOR THE
DISTRICT OF NEVADA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 407

UNITED STATES OF AMERICA EX REL.
L. B. BINION, PETITIONER

v.

UNITED STATES MARSHAL FOR THE
DISTRICT OF NEVADA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 11–24) is reported at 188 F. Supp. 905. The opinion of the court of appeals (R. 101–107) is reported at 292 F. 2d 494.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1961, and a petition for rehearing was denied on August 4, 1961. The petition for a writ of certiorari was filed on September 13, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals was required to decide an issue, in a habeas corpus proceeding, which, even if petitioner was correct, would not entitle him to release.

2. Whether petitioner is entitled to credit on his prison sentence for a period during which he was completely free from custody, and not even on bail, as a result of an order in his favor in a habeas corpus proceeding which he himself brought.

3. Whether petitioner is entitled to credit on a prison sentence, as well as a separate probation sentence, for a period of time when he was on probation and not in prison.

4. Whether petitioner is entitled to credit on his prison sentence for time when he was not in custody because of allegedly unjustified delay by the government in filing the record and its brief and in taking petitioner into custody.

STATEMENT

The pertinent facts are set out in the memorandum opinion of the district court (R. 12–15):

On September 3, 1952, petitioner entered a plea of nolo contendere in the District Court for the District of Nevada to an indictment charging income tax evasion for the year 1949, in violation of 26 U.S.C. 145(b). He was sentenced to pay a fine of $15,000; imposition of a prison sentence was suspended, and he was placed on probation for five years.

On December 14, 1953, in the District Court for the Western District of Texas, petitioner entered a plea

of guilty to two indictments charging income tax evasion for the years of 1947 and 1948. The court sentenced him to three concurrent terms of five years each, to be followed by probation for three years, and imposed a fine of $20,000. Service of the sentences commenced on December 14, 1953.

In August 1956, petitioner filed a motion under 28 U.S.C. 2255 to correct the Texas sentences, alleging that they were excessive. This motion was denied and an appeal was taken to the Court of Appeals for the Fifth Circuit. At that time *Achilli* v. *United States,* 353 U.S. 373, involving the same question, was pending before this Court, and the court of appeals entered an order deferring determination of petitioner's case pending a decision by this Court in the *Achilli* case. On March 11, 1957, this Court granted petitioner's release on bail pending the *Achilli* decision, and on March 19, 1959, petitioner was released on $25,000 cash bond by the District Court for the Western District of Texas. On that date there remained three months and twenty-seven days to be served on the Texas sentences prior to eligibility for mandatory release under the provisions of 18 U.S.C. 4164. Petitioner had previously been denied parole. On May 27, 1957, this Court decided the *Achilli* case adversely to petitioner's contention, and on June 28, 1957, the Court of Appeals for the Fifth Circuit affirmed the district court's denial of petitioner's motion to correct sentence. *Binion* v. *United States,* 245 F. 2d 466. On October 14, 1957, this Court denied certiorari. 355 U.S. 834.

On October 16, 1957, petitioner surrendered to the United States Marshal at Philadelphia, Pennsylvania, although he resided and had previously been under supervision in Las Vegas, Nevada. On the same day, he filed a petition for a writ of habeas corpus in the Eastern District of Pennsylvania, and applied for release on bail pending hearing on the petition. The court authorized his release on $5,000 bail on the same day and issued a rule to show cause why the writ should not be granted. On November 3, 1958, the case was called for hearing and was submitted on briefs. Sixteen exhibits and a stipulation signed only by the relator's counsel were admitted into evidence. No witnesses were called by either side.

The evidence showed the following:[1] Under the five-year period of probation granted by the district court in Nevada on September 3, 1952, petitioner was directed to, and did, report to the United States Probation Officer for that district once every sixty days prior to commencement of his Texas sentence. Upon his release on bail from the United States Penitentiary at Leavenworth on March 19, 1957, he again began reporting to his probation officer who instructed him to report once a week, a request with which petitioner complied. On September 3, 1957, the five-year probation period terminated, and on September 13, 1957, an order to that effect was signed by the court. The probation officer nevertheless instructed Binion to continue reporting weekly pending clarification of

[1] The evidence adduced at this hearing and that adduced at the hearing of August 15, 1960, *infra*, p. 7, are practically identical.

his status.[2] On September 19, 1957, the probation officer wrote to the United States Board of Parole stating that petitioner was continuing to report to him and requesting information as to his status. The Board of Parole replied on October 21, 1957, advising that petitioner was not reporting pursuant to any order or request by the Board; that he was not in the custody of the Attorney General while free on bail; and that, consequently, there was no requirement by the Board that he report to the probation officer. The latter so advised petitioner on October 23, 1957, and petitioner did not report thereafter.

Upon this evidence, the District Court for the Eastern District of Pennsylvania found that petitioner had reported to the probation officer in the same manner as one under parole supervision,[3] and that while petitioner was not on "parole de jure, he was so de facto and bound to conduct himself accordingly" (Pet. 24a). Since petitioner had reported for a period greater than the the time remaining to be served in physical custody under the Texas sentence,

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[2] It should be noted, however, that during the seven-month period between March 19, 1957, and October 23, 1957, petitioner was away from the District of Nevada on six separate occasions including trips to Philadelphia, Pennsylvania, Mecca, California, and Jordan, Montana. On one absence he stayed at his ranch in Montana for a period of two and one-half months and made contact with the probation officer by telephone.

[3] After the original petition for a writ of habeas corpus was filed, the probation officer wrote to petitioner's attorney, stating that petitioner reported prior to October 23, 1957, in the same manner as he "would require a parolee or [conditional releasee] to report for supervision" (R. 75; but see R. 44).

the court concluded that service of the confinement portion of petitioner's sentence had been completed and that he was entitled to be released. On December 22, 1958, an order was signed discharging petitioner from custody. On February 19, 1959, the government filed a notice of appeal (R. 49).

On December 9, 1959, the Court of Appeals for the Third Circuit reversed the order of the district court, holding that petitioner was not entitled to credit for the period he was on probation, *i.e.*, from March 19 to September 3, 1957. It concluded, however, that he was entitled to credit for the period from the latter date to October 23, 1957. *United States ex rel. Binion* v. *O'Brien,* 273 F. 2d 495. Petitioner petitioned for a rehearing, but this was denied. Certiorari was likewise denied, on June 6, 1960. 363 U.S. 812.

On June 10, 1960, petitioner attempted to surrender to the Deputy United States Marshal at Las Vegas, Nevada, but the Marshal refused to take him into custody.[4] On June 13, 1960, the Court of Appeals for the Third Circuit issued its mandate, and on

[4] Mr. Harry E. Claiborne, petitioner's attorney at Las Vegas, testified at the hearing on August 15, 1960, in the District of Nevada (see *infra*, p. 7) that when he brought petitioner to Deputy Marshal Sampson on June 10, 1960, Mr. Sampson stated that he did not know what to do with petitioner, but that shortly afterward the Deputy Marshal stated that the United States Attorney advised him not to hold petitioner (R. 40). Deputy Marshal Sampson testified that Mr. Claiborne appeared with petitioner on June 10, 1960, and advised that he was surrendering petitioner (R. 60); that the attorney remained about ten or fifteen minutes; that he, Sampson, talked with the United States Attorney in his office in the presence of both petitioner and his attorney; that he advised

July 5, 1960, the District Court for the Eastern District of Pennsylvania ordered petitioner remanded to the custody of the Attorney General. On July 12, 1960, petitioner was taken into custody, but he was immediately released on a writ of habeas corpus issued by the District Court for the District of Nevada and admitted to bail (R. 12).

On August 15, 1960, a hearing was held in the District of Nevada to determine the validity of petitioner's detention. At that time the same exhibits which were in evidence in the District Court for the Eastern District of Pennsylvania and were before the Court of Appeals for the Third Circuit on petitioner's prior appeal were again introduced into evidence (R. 47–49). In addition, Chief Probation Officer Hubert A. Boyd testified that petitioner "reported to my office * * * as a probationer" and that he (Boyd) had talked with the sentencing judge who suggested that he handle "this case on probation in the same manner as * * * any case here in Nevada" (R. 44).

On November 9, 1960, the district court ordered the writ of habeas corpus discharged and petitioner remanded to the custody of the Marshal. Petitioner immediately filed a notice of appeal and was released on bail. The court of appeals affirmed.[5]

ARGUMENT

1. Petitioner contends (Pet. 14–15, 19–21) that the Court of Appeals for the Ninth Circuit in this case erred in refusing to consider whether he was entitled

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Mr. Claiborne he would not accept custody of petitioner; and that he in no way restrained petitioner's movements or liberty (R. 81, 83).

[5] Petitioner has continued on bail.

to credit on his prison sentence for the time he continued to report to the probation officer after his probation period had expired (September 3, 1957, to October 23, 1957). He contends that this refusal is in conflict with a decision of the Court of Appeals for the Third Circuit on another phase of this litigation. The Court of Appeals for the Third Circuit had stated that "Binion is entitled to credit on his Texas sentence * * * for that period during which he was required to report following expiration of his Nevada sentence of probation, since his status then was solely that of one released on bail" (Pet. App. 19a). The Court of Appeals for the Ninth Circuit, on that issue, held (Pet. App. 7a):

> Inasmuch as even under appellant's calculation there were 110 days left to be served upon his Texas sentence when he was released on bail, he would not now be entitled to be released even if he should be given credit for this 50 days upon his sentence. At this time we express neither approval nor disapproval of the holding of the Third Circuit that appellant was entitled to this 50 days credit.

We submit that the Ninth Circuit's decision was correct and is not in conflict with that of the Third Circuit. First, the Ninth Circuit could not have erred on the merits of petitioner's claim or decided it in conflict with the Third Circuit, since the Ninth Circuit did not decide the claim.

Second, as to whether the Ninth Circuit properly refused to decide the issue, petitioner would not be entitled to release from custody even if petitioner were

entitled to the fifty days' credit for which the Third Circuit thought he should receive credit. It is well settled that an action for habeas corpus will not lie unless it results in immediate release. *McNally* v. *Hill,* 293 U.S. 131. The decision of the Third Circuit is not in conflict, for it did not hold that the court was *required* to decide the issue even though petitioner was not entitled to release; the most it did, and this only by implication,[6] was to say that the court was authorized to decide the issue. The fact that the Ninth Circuit refused to decide the issue despite its authority to do so (we assume this authority only *arguendo*) does not conflict with the Third Circuit's decision.

2. Petitioner also urges (Pet. 15–19) that he is entitled to credit on his prison sentence for the fifty-eight days between his full release from custody by the District Court for the Eastern District of Pennsylvania and the date the government filed a notice of appeal (December 22, 1958, to February 19, 1959).[7] Petitioner

[6] As the District Court for the District of Nevada held (R. 19–20, 22), we believe that the Court of Appeals for the Third Circuit was not authorized to determine the issue, and therefore that court's statements were dictum. There is nothing in the Third Circuit's opinion indicating whether or not it was purporting actually to decide the issue.

[7] Petitioner claims (Pet. 15–16) that the decision below rejecting this claim is in conflict with that of the Court of Appeals for the District of Columbia in *Harris* v. *Lang*, 27 App. D.C. 84 (1906). In the *Harris* case the court of appeals did not order reversal of what it considered to be an erroneous decision of the Supreme Court of the District of Columbia in favor of the prisoner on the merits in a habeas corpus case because, it stated, the prisoner's term of imprisonment had expired during the appeal. This determination was apparently

raised the same point in his petition for rehearing in the Third Circuit but was unsuccessful there, and he did not then raise it in his petition for certiorari in this Court.

It is well established that mere lapse of time without imprisonment or other restraint contemplated by law does not constitute service of sentence. *Anderson* v. *Corall,* 263 U.S. 193; *Patterson* v. *Jones,* 141 F. 2d 319 (C.A. 9); *Hunter* v. *McDonald,* 159 F. 2d 861 (C.A. 10), certiorari denied, 331 U.S. 853. See also *Morgan* v. *Ward,* 248 Fed. 691 (C.A. 8). If petitioner's contentions were correct, however, he would receive credit for a period of time when he was neither in prison nor on bail. To award him such credit would clearly contradict Rule 38(a)(2) of the Federal Rules of Criminal Procedure which, pending an appeal, prevents even a prisoner on bail from receiving credit on his sentence.[8] Moreover, his freedom from custody—

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based on the implicit assumption that the sentence continued to run even though the prisoner was not in custody (whether on bail is not shown). The court of appeals held that, even if the lower court had been right on the merits, its release of the prisoner was premature. Here, in contrast, if the District Court for the Eastern District of Pennsylvania had been correct in crediting the probation period, petitioner was entitled to release.

The other decisions on which petitioner relies (Pet. 16–17) involve the erroneous release of prisoners by the government itself. These decisions have held that a prison sentence continues to run in those circumstances. Here, however, petitioner himself sought release by bringing a habeas corpus proceeding. Petitioner should not get the benefit of an erroneous judicial determination caused by his own efforts.

[8] Rule 38(a)(2) provides: "A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail."

which interrupted the running of his sentence—was the result of a decision favorable to petitioner in a habeas corpus proceeding which he himself brought.

Even assuming that petitioner would be entitled to receive credit as time spent in confinement for this period, the fifty-day credit to which the Court of Appeals for the Third Circuit said petitioner was entitled would have to be deducted from the fifty-eight days claimed here, leaving only eight days' credit, if any, in controversy. As a result, petitioner would not now be entitled to release even if his arguments on this issue are correct.

3. Petitioner also argues again (Pet. 21–25) the issue whether he is entitled to credit on his prison sentence, in addition to the credit he received on his probation sentence, for the time between when he was released on bail pending the decision in *Achilli* v. *United States, supra,* and when his probation expired while he was free on bail (March 19, 1957, to September 3, 1957). This question was decided contrary to petitioner's contention in *United States ex rel. Binion* v. *O'Brien,* 273 F. 2d 495 (C.A. 3), certiorari denied, 363 U.S. 812,* and the district court and the court

*The Court of Appeals for the Third Circuit stated (Pet. App. 17a): "Initially, we must consider Binion's status when placed on bail by the Supreme Court. We cannot agree with the district court that Binion, when enlarged on bond, was under no restraint other than the usual limitations of one so freed. On the contrary, Binion at that time, March 19, 1957, and until September 3, 1957, was a probationer under the Nevada sentence which clearly required reporting to his probation officer. To ignore the explicit terms of the Nevada sentence would be clearly unwarranted. It is true that, while incarcerated, he was not required to affirmatively report, for in fact he could not do so. However, upon release, the terms of his

of appeals in this litigation reconsidered and agreed with that decision (R. 20–21; Pet. App. 7a). While *res judicata* is not applicable in habeas corpus proceedings, this Court has stated in *Salinger* v. *Loisel,* 265 U.S. 224, 230–231, that a federal court may base its refusal to discharge on a prior refusal, since repeated adjudications of the same issue should be avoided. See *Darr* v. *Burford,* 339 U.S. 200, 215; *Cruz-Sanchez* v. *Robinson,* 249 F. 2d 771, 774 (C.A. 9); *Swihart* v. *Johnston, Warden,* 150 F. 2d 721, 723 (C.A. 9), certiorari denied, 327 U.S. 789; *Broadus-Bey* v. *Diamond,* 264 F. 2d 242 (C.A. 6).

4. Petitioner suggests (Pet. 25) that his release is "additionally appropriate because the record reflects unjustifiable delay * * * on the part of the Government amounting to some 90 days." First, petitioner alleges that there was a "delay" of fifty-eight days in filing the record and brief on appeal in the Third Circuit. This issue, however, was not raised before the Court of Appeals for the Third Circuit, nor was it even mentioned in the district court or the court of appeals in this case. Consequently, it is not properly before this Court now. In

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probation became operative, and he had a duty to report, for the Supreme Court's action on his request for bail did not purport to affect his status as a probationer under the Nevada sentence, but rather only went to his status under the Texas sentence. In essence, Binion desires double credit—for completion of his probation and completion of his sentence of imprisonment for the same reporting to or contact with his probation officer. Since he had a duty to report under the Nevada probation order until September 3, 1957, he cannot be given credit on his later sentence for reporting done prior to that date."

addition, petitioner suggests no justification for translating this delay into a credit on his prison sentence despite the fact he was not in custody. Indeed, his claim is directly inconsistent with Rule 38(a)(2), F.R. Crim. P.

Second, petitioner includes in the ninety-day period of "unjustifiable delay" a period of thirty-two days (while he was free following the decision of the District Court for the Eastern District of Pennsylvania in his behalf) from June 10, 1960, when he unsuccessfully attempted to surrender himself into custody, and July 12, 1960, when he was actually taken into custody after the Third Circuit had decided against him. The United States Marshal in Nevada to whom petitioner attempted to surrender refused to accept petitioner into custody in the absence of a court order, and the District Court for the District of Nevada did not enter its order authorizing and directing the Marshal to take petitioner into custody until July 5, 1960. The action of the Marshal, in awaiting a court order, was, of course, entirely proper. Moreover, petitioner was not prejudiced by the Marshal's refusal, since it is apparent that he was attempting to surrender solely to establish a basis for an immediate petition for a writ of habeas corpus and application for bail in the District Court for the District of Nevada. This is exactly what he did as soon as he was taken into custody on July 12, 1960, and he was immediately released on bail.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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Petitioner,

v.

UNITED STATES MARSHAL FOR THE DISTRICT OF NEVADA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner's Reply Memorandum.

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UNITED STATES MARSHAL FOR THE DISTRICT OF NEVADA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONER'S REPLY MEMORANDUM.

Respondent's Brief in Opposition strays so far from the facts and the issues that a few words by way of reply seem imperatively required.

I. There Is an Actual Conflict Between Two Circuits as to the Amount of Time This Particular Petitioner Is Still Required to Serve Under a Sentence Imposed in 1953.

When petitioner was released on bail pursuant to order of this Court (352 U. S. 1028), he had three months and twenty days remaining to serve on the Texas sentence imposed in December, 1953 (273 F. 2d at 496; Pet. App. 15a). The statement by the Government (Br. Op. 3) that there were three months and twenty-seven days remaining is plainly wrong.

The Third Circuit held (273 F. 2d at 498; Pet. App. 19a) that he was entitled to credit for 50 days by reason of the Probation Officer's restraints in 1957, and that period plus the two days' credit for actual custody in the hands of the Marshal at Philadelphia (273 F. 2d at 497, note 1; Pet. App. 16a, note 1), left Binion with 58 days to serve.

The order of the District Court for Eastern Pennsylvania, *drafted* by the Government (Pet. 12-13), specifically recited that—

> "The time remaining to be served shall be computed in accordance with the opinion of the United States Court of Appeals for the Third Circuit dated December 9, 1959 [i.e., 273 F. 2d 495; Pet. App. 14a-20a]."

Thereafter, the United States District Court for Nevada (R. 11-24; 188 F. Supp. 905) disagreed with the Third Circuit, holding that Binion was not entitled to any credit for the Probation Officer's restraints. The Ninth Circuit then refused to resolve the difference, on the view that Binion was not in either event entitled to immediate release (Pet. App. 7a-8a; 292 F. 2d at 498).

How, in the face of Binion's present contention that this obvious difference in views leaves the Government's custodial officers without authoritative guidance as to his proper release date (Pet. 14-15), respondent can still argue (Br. Op. 8-9) that there is no conflict, or that the Third Circuit did not hold that it had authority to decide the issue of petitioner's remaining time when it *did* decide the issue, is simply beyond comprehension.

That *Harris v. Lang* conflicts with the decision of the court below is acknowledged in that court's reliance on *Patterson v. Jones*, 141 F. 2d 319 (1944), for there the Ninth Circuit expressly disagreed with and refused to follow *Harris v. Lang*.

II. The Controversy Here Touches All Remaining Time to Be Served on Any Computation.

A. Equally incomprehensible is respondent's further assertion (Br. Op. 11):

> "Even assuming that petitioner would be entitled to receive credit as time spent in confinement for this period, the fifty-day credit to which the Court of Appeals for the Third Circuit said petitioner was entitled would have to be deducted from the fifty-eight days claimed here, leaving only eight days' credit, if any, in controversy. As a result, petitioner would not now be entitled to release even if his arguments on this issue are correct."

The foregoing comments completely misapprehend the record. The 50-day period involved in the Third Circuit decision was credit for unlawful restraint imposed between September 3rd and October 23rd, 1957. 273 F. 2d at 497-498. The 58-day period runs from December 22, 1958, to February 19, 1959, over two years later. These two periods have not the slightest connection factually or legally. Yet the Government blandly argues to this Court that if petitioner receives credit for the latter, he must be deprived of credit for the former. Obviously this cannot be true.

B. The Chief Probation Officer, Hubert A. Boyd, made it abundantly clear that the close supervision imposed upon the petitioner in the period from March 19, 1957, to October 23, 1957, was *in addition* to the requirement of probation under his Nevada sentence, and was because of the Texas sentence (R. 65, 75). Thus, although the court suggested to Mr. Boyd that he handle "this case on probation in the same manner as . . . any case here in Nevada" (R. 44), the probation officer did not obey the court's instruction (Pet. 6, 22).

C. The Brief in Opposition asserts for the first time that to give petitioner credit for the 58 days following his

discharge on habeas corpus and the Government's notice of appeal "would clearly contradict Rule 38(a)(2) of the Federal Rules of Criminal Procedure which, pending an appeal, prevents even a prisoner on bail from receiving credit on his sentence" (Br. Op. 10). Surely the Government must know that the Rules of Criminal Procedure do not apply to a habeas corpus proceeding. Furthermore, even under this Rule, after the petitioner was discharged he did not seek to *stay* the sentence of imprisonment; he did not elect not to commence service[1] of the sentence; he was *not* released under bail or even under his own recognizance. He was completely discharged! The appeal was taken by the Government (Pet. 18, 19), under the Federal Rules of Civil Procedure.

There is also no merit to the other assertion by the Government in the same paragraph: "If petitioner's contentions were correct, however, he would receive credit for a period of time when he was neither in prison nor on bail" (Br. Op. 10). This tired, old argument has appeared in almost every Government brief in this litigation. The Government persists in refusing to acknowledge the long line of cases, summarized in the Petition at page 23, where prisoners have received credit for periods of time when they were "neither in prison nor on bail." Perhaps there is no better evidence of the vital necessity for this Court to hear this case than the refusal of the Department of Justice to acknowledge this unbroken line of decisions by the lower federal courts. Plainly this presents a far-reaching problem in the administration of justice.

D. On petitioner's primary assertion that the decision below is in direct conflict with the decisions of four other courts of appeals, the text of the Brief in Opposition is completely silent. Counsel for the Government use the text to imply erroneously that the issue has already been decided

1. "In order to stay the sentence under that rule there must be both an appeal and an election by the appellant not to commence service of his sentence." *Hogue v. United States*, 287 F. 2d 99, 101 (C. A. 5, 1961).

and to make other irrelevant arguments. But on the issue of the conflict among the circuits, the Government puts its argument into a footnote. See footnote 7 on page 9.

The nature of the Government's position makes it rather clear why the Solicitor General relegated it to a footnote. Only one of the cases relied upon by petitioner is discussed. That is *Harris v. Lang*, 27 App. D. C. 84. That court held that a prisoner's sentence continued to run following his discharge on habeas corpus so that, even though the lower court was in error in granting the writ, its decision would not be reversed.

The Government does not deny that the case so held, but rather attempts to make a distinction between *Harris v. Lang* and this case that is patently spurious. "The [District of Columbia] court of appeals held that, even if the lower court had been right on the merits, its release of the prisoner was premature. Here, in contrast, if the District Court for the Eastern District of Pennsylvania had been correct in crediting the probation period, petitioner was entitled to release" (Br. op. 10 n. 7). The first sentence here is sheer nonsense. To say that, even if a court had been right on the merits, its decision was wrong is to deprive the words right and wrong of any meaning. If the lower court in *Harris v. Lang* was right on the merits, its decision must have been right. The court of appeals held that the lower court was wrong on the merits and its decision was wrong.

Once again the Government is guilty of stating a half-truth. There were several issues involved in the merits in *Harris v. Lang*. At one point in the opinion, 27 App. D. C. at 88, the court does indicate that, even if the lower court had been right *on a subsidiary issue on the merits*, discharge of the prisoner was premature. That is, obviously enough, because the lower court was wrong on the merits of the controlling issue. This is all that underlies the trumped-up "in contrast" between this case and *Harris v. Lang*.

The Government's distinction of the decisions of the Second, Ninth and Tenth Circuits is no less specious. Without even a single citation to any of the cases, the Brief in Opposition asserts: "The other decisions on which petitioner relies (Pet. 16-17) involve the erroneous release of prisoners by the government itself. . . . Here, however, petitioner himself sought release by bringing a habeas corpus proceeding. Petitioner should not get the benefit of an erroneous judicial determination caused by his own efforts" (Br. Op. 10, n. 7).

There are several remarkable things about this statement. The most significant, perhaps, is the implicit pronouncement that the judiciary is not a part of the Government. All the cases cited by petitioner are classed as involving "the erroneous release of prisoners by the government itself," whereas, in this case there is only "an erroneous judicial determination." Thus, according to the Brief in Opposition, the judiciary is not part of the Government. Perhaps what the Brief in Opposition means to suggest is that the other cases involved erroneous decisions by members of the executive branch, while here there is an erroneous decision by a member of the judicial branch of the Government. How or why that should make any difference is not explained because the Government did not choose to devote more than one brief footnote passage to the whole issue. Moreover, it has never argued or intimated such a theory in any prior stage of the litigation. Finally, the cases themselves simply do not fall into such categories. *Harris v. Lang, supra*, involved an erroneous judicial decision. So, too, *Smith v. Swope*, 91 F. 2d 260 (C. A. 9, 1937), and *Albori v. United States*, 67 F. 2d 4 (C. A. 9, 1933), do not fit the description of erroneous decisions by a member of the executive branch.

Another truly remarkable innuendo in the footnote is that the petitioner ought not to be heard to complain because he brought this all on himself. "Petitioner should not get the benefit of an erroneous judicial determination

caused by his own efforts," says the Brief in Opposition. This is patently absurd. Petitioner did not cause an erroneous judicial determination. The Government seems to believe that there is something blameworthy in a federal prisoner's seeking to invoke the Great Writ of the Common Law. Such an audacious fellow ought not to be allowed any benefit, urges the Government.

III. "Law and Justice" (28 U. S. C. § 2243) Require Petitioner's Immediate Release.

Petitioner, released more than four and a half years ago (R. 51, 60-61, 78), has been at liberty all of that time, except for 2 days in October 1957 and one day in July 1960. Much of the intervening delay, as has been shown (Pet. 25-26), is attributable to dilatoriness on the part of public officials.

The fact that he was originally released on his own application is no more significant here than it was in *Harris v. Lang*, 27 App. D. C. 84, discussed in footnote fashion at Br. Op. 9-10, note 7. After all, writs of habeas corpus issue only on application. And, when petitioner was discharged by the court in the Eastern District of Pennsylvania *no bail was required then or when the Government filed a notice of appeal.* The statement to the contrary by the Nevada court (R. 14, note 2; 188 F. Supp. at 907, note 2) and adopted by the Government (Br. Op. 2) is in error.

If the present petition is granted and the case is set for argument, petitioner will show that, as a matter of law, he has served all his time.

But petitioner can be granted his liberty without any need for a plenary hearing. And unless there is present here some compelling reason why the United States must, in violation of expressed Congressional policy, exact its ounce of flesh; unless some overriding social interest requires that this individual must be pursued with the im-

placable vindictiveness with which Inspector Javert hounded Jean Valjean in *Les Miserables;* then it is submitted that, following *Powell v. Wiman*, 287 F. 2d 275, 282 (C. A. 5, 1961) and *Aderhold v. O'Neill*, 66 F. 2d 85 (C. A. 5, 1933), and under the "law and justice" formula of 28 U. S. C. § 2243, petitioner's discharge now would best serve the ends of justice.

Respectfully submitted,

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